theless, it was held, relying on an earlier decision,[26] that the objection of interest on the ground of ownership went to the weight and not to the competency of the evidence, inasmuch as by statute all persons interested had become competent witnesses. This application of the statute is not only irreconcilable with the requirements of the exception, as above pointed out, but it also involves a misunderstanding of the *rationale* of the statute relied upon. A statute of this kind presupposes an opportunity to weigh a witness' measure of credit, as well as the means afforded for doing so by cross-examination, and the like.[27] These safeguards, which alone justify the risk of admitting interested witnesses, are absent in the case of the declarations of interested persons who are deceased, and the action of the New Hampshire court in extending the statute to such a case was clearly indefensible.

CANCELLATION AND CLOUD ON TITLE.—Although the jurisdiction of equity to cancel an instrument is said to be discretionary,[1] it is now governed by certain recognized principles.[2] First, if the instrument would be valid if sued upon at law, equity will not cancel unless there appear grounds for which, according to established principles, equity will give affirmative relief, e. g., fraud, mistake, etc.[3] This is the meaning of the occasional assertion,[4] "where the complainant's defense is purely equitable, cancellation will be decreed." A defense "purely equitable," however, is not one which would be a defense to an action for specific performance,[5] although it has been so considered,[6] and cancellation given in a case of mere hardship.[7] In the second place, if the complainant's defense is one which would be accepted by a court of law, there must appear other circumstances by reason of which the protection of the law courts would be inadequate.[8] Such circumstances may show, for example, danger that the defense may become unavailable by the time suit is brought on the instrument, that, if negotiable, the instrument may pass into the hands of an innocent purchaser, or that the instrument clouds the complainant's title to realty.[9] These two grounds for equitable relief are sometimes confused.[10]

The basis of relief for cloud on title is the existence of a semblance of title or interest, in fact unfounded, but, while allowed to continue, prejudicial to the marketability of the property.[11] In determining whether a claim is one affecting marketability, the view clearly most in accord with equitable principles is that recognized by some jurisdictions according to which relief is granted when the instrument does in fact depreciate the market value

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[26]Lawrence *v.* Tennant (1888) 64 N. H. 532, 541; followed in Nutter *v.* Tucker (1892) 67 N. H. 185.
[27]Wigmore, Ev. § 576 (2).

[1]Hamilton *v.* Cummings (1815) 1 Johns. Chan. 517.
[2]Gunter *v.* Thomas (N. C. 1840), 1 Ired. Eq. 199; Lynch's Appeal (1887) 97 Pa. St. 349.
[3]Pom. Eq. Rom. § 684.
[4]Venice *v.* Woodruff (1875) 62 N. Y. 462.
[5]Day *v.* Newman (1788) 2 Cox Eq. 77; Twining *v.* Morrice (1788) 3 Bro. Ch. 326; Stewart's Appeal (1875) 78 Pa. St. 88.
[6]Smith *v.* Hughes (1880) 50 Wis. 620; ch. Kirby *v.* Harrison (1853) 2 Oh. St. 326.
[7]Esham *v.* Lamar (Ky. 1849) 10 B. Monroe 43.
[8]Hoare *v.* Brembridge (1872) L. R 14 Eq. 522.
[9]Field *v.* Holbrook (N. Y. 1857) 14 How. Pr. 103.
[10]Hamilton *v.* Cummings, *supra.*
[11]Rigdon *v.* Shirk (1889) 127 Ill. 411.

of the property.[12] In most jurisdictions, however, this view is repudiated. In modified form it exists in Missouri where instruments whose defects are discoverable only by legal acumen will be cancelled.[13] In Massachusetts the instrument must on its face, or together with extrinsic facts, be some evidence of a right adverse to the plaintiff.[14] According to the general view the instrument must not be void on its face, or of such a nature that, in any proceedings, its defects must necessarily appear.[15] The liberal view, early asserted by Chancellor Kent,[16] was soon rejected in New York, which has apparently set its face against a free use of the remedy. Thus, not only must the claim be such as to require extrinsic facts to disprove its validity, but proof of a prior record title in the plaintiff is held not to be an extrinsic fact.[17]

A recent Appellate Division case in New York presents an unusual application of the remedy. *St. Stephens Church* v. *The Church of the Transfiguration* (1909) N. Y. L. J. Vol. XL, 105. Church A, having arranged to sell property to church B, found it necessary to convey through X. X covenanted to A that the land should be used only for church purposes; and B likewise on conveyance, covenanted to X. In a suit by B it was held that the covenant from X to A might be cancelled as a cloud on title. Whether this covenant be looked upon as one merely between X and A, or, as apparently viewed by the court, substantially between B and A, the covenant not appearing to be for the benefit of any land of A's, was purely personal, did not run with the land, and is uninforcible by injunction.[18] Since, as a claim to an equitable encumbrance it would be invalid on its face, under the settled New York rule, no relief could be given. Moreover, the cancellation of the instrument would deprive the defendant of a valid legal right, which, it is believed, could not be taken away even if an equitable easement were apparently created.[19] The real foundation of the relief seems to be not cloud on title, but the hardship to the complainant consisting in the slight value of the covenant to the defendant and the great inconvenience to the plaintiff. That hardship resulting from circumstances subsequent to the formation of the contract may be a defense to specific performance has been recognized[20] by the weight of authority. But hardship, as a basis for affirmative relief under any circumstances, has scarcely ever been entertained.[21] Yet, though unsupported by authority, the hardship, combined with the apparent attempt of the defendant to use the covenant as a means of extortion furnishes strong equities in the plaintiff's favor.

[12]Day Co. *v.* State (1887) 68 Tex. 526; Jones *v.* Perry (Tenn. 1836) 10 Yerg. 59.
[13]Merchants' Bank & Player *v.* Evans (1873) 51 Mo. 335.
[14]Nickerson *v.* Loud (1874) 115 Mass. 94.
[15]Van Dorch *v.* Mayor of N. Y. (N. Y. 1842) 9 Paige 388; Peirsoll *v.* Elliott (1832) 6 Peters 95; Washburn *v.* Burnham (1875) 63 N. Y. 132; Thompson *v.* Etowah Iron Co. (1893) 91 Ga. 538; Gilman *v.* Van Brunt (1882) 29 Minn. 271; Pixley *v.* Huggins (1860) 15 Cal. 127.
[16]Hamilton *v.* Cummings, *supra.*
[17]Bockes *v.* Lansing (1878) 74 N. Y. 437.
[18]Norcross *v.* James (1885) 140 Mass. 188.
[19]Stewart's Appeal (1875) 78 Pa. St. 88; Amerman *v.* Deane (1892) 132 N. Y. 355; Fourth Presby. Church *v.* Steiner (N. Y. 1894) 79 Hun 314.
[20]COLUMBIA LAW REVIEW 68; 8 *Ibid.* 322.
[21]The only case to be found granting affirmative relief for hardship is Esham *v.* Lamar, *supra.*